



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Southwest Marine of San Francisco, Inc.--
Request for Reconsideration
File: B-229654.2
Date: January 19, 1988

DIGEST

Prior decision holding that if considered a timely initial agency protest the subsequent protest with General Accounting Office was untimely because it was not filed within the required 10 working days after the closing date for receipt of proposals--the initial adverse agency action--is affirmed; the fact that the procuring agency received proposals on the scheduled closing date without taking any corrective action in response to the protest constitutes adverse agency action and begins the running of the 10-day limitation period.

DECISION

Southwest Marine of San Francisco, Inc., requests that we reconsider our decision in Southwest Marine of San Francisco, Inc., B-229654, Nov. 30, 1987, 87-2 CPD ¶ 531, in which we dismissed as untimely Southwest's protest against the terms of a solicitation issued by the Military Sealift Command (MSC), Pacific, for repair and overhaul work on a ship. We dismissed Southwest's protest because it was not filed with us within 10 working days of initial adverse agency action--i.e., receipt of proposals--on its prior agency-level protest.

We affirm our prior decision.

Southwest's objection to the solicitation is that a portion of the work is set aside for small business concerns. Southwest contends that on the date it allegedly protested this provision to the contracting agency--the closing date, October 30, 1987,--it had no actual or constructive knowledge that the agency proceeded with the procurement, or received any proposals. Southwest asserts that on that date it only suspected that one company would submit a proposal; its suspicion was not confirmed until November 12, 1987, in a telephone conversation with the contracting officer. Since its actual or constructive knowledge of the basis for

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protest did not occur until November 12, Southwest argues that the protest filed in our Office on November 20 was timely.

We do not agree. In response to Southwest's request for reconsideration, MSC has provided us with a copy of Southwest's agency-level "protest," a document which we did not have at the time of our earlier decision. After a review of this document we seriously doubt that Southwest's alleged written initial agency protest was in fact a "protest." To be regarded as a protest, a written statement need not state explicitly that it is so intended. See Brussels Steel America, Inc., B-222541, June 24, 1986, 86-1 CPD ¶ 584. What is required, however, is that a written statement contain both an expression of dissatisfaction over the agency's conduct of the procurement and a request for corrective action. Id.

Southwest's "protest" is found on the back of the Department of Defense form 1707, the solicitation cover sheet, on which blanks are provided for nonresponding offerors to state their reasons for not submitting an offer. This form was returned by Southwest in lieu of an offer and was received by the contracting agency less than an hour before proposals were due. The single paragraph written by Southwest in the space provided contains no request for corrective action. At best, the paragraph expresses dissatisfaction with the partial set-aside. This does not constitute a formal protest. Nevertheless, even if we give Southwest the benefit of the doubt, its protest filed with our Office is still untimely.

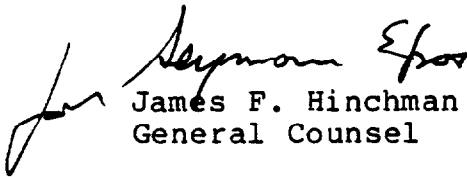
Under our Bid Protest Regulations, we have consistently held that the fact that the procuring agency received proposals on the scheduled closing date without taking any corrective action in response to an agency-level protest constitutes adverse agency action and begins the running of the 10-day limitation period. Dock Express Contractors, Inc.--Request for Reconsideration, B-223966.2, Mar. 4, 1987, 87-1 CPD ¶ 243. Whether MSC intended adverse action on the protest is irrelevant, since proceeding with the opening of proposals on the closing date was in fact an adverse agency action on the protest. Id.

We do not believe that filing an initial agency protest less than an hour before the deadline for receipt of proposals, as Southwest did, gives an agency a reasonable opportunity to act upon the protest except to either postpone the closing date or continue to accept proposals. See id. If the agency proceeds with the procurement under such circumstances, without corrective action, it clearly constitutes adverse initial agency action. Thus,

Southwest's protest is untimely because it was filed more than 10 days after the closing date. Bid protests are serious matters and our strict construction of the Bid Protest Regulations is necessitated by the strict time limits imposed by the Competition in Contracting Act of 1984, 31 U.S.C. § 3553 (Supp. III 1985). More importantly, our regulations provide effective and equitable procedural standards which give all parties a fair opportunity to present their cases, while insuring that protests may be resolved in a speedy manner so that the government's procurement process is not detrimentally affected. See Shaw Aero Development Inc., B-221980, Apr. 11, 1986, 86-1 CPD ¶ 357.

Finally, Southwest argues that even if its protest to our Office is considered untimely, the issue presented regarding small business set-asides is a significant issue of widespread interest affecting a broad class of procurements, thus justifying a waiver of our timeliness requirements.

The significant issue exception is used where the subject matter of the protest evidences a matter of widespread interest or importance to the procurement community and the matter has not been considered on the merits in previous decision. Vacco Industries, B-222295, Apr. 4, 1986, 86-1 CPD ¶ 329. In order to prevent the timeliness requirements from becoming meaningless, this exception is strictly construed and seldom used. Universal Design Systems, Inc.--Reconsideration, B-211547.3, Aug. 16, 1983, 83-2 CPD ¶ 220. The protest before us does not appear to present an issue whose resolution would benefit parties other than Southwest.


James F. Hinchman
General Counsel